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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 436

JOSEPH DE ZON,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD., A CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

On certiorari to the Circuit Court of Appeals for the Ninth Circuit to review the decision of that Court on July 3, 1942 (R. 1-10) [1] affirming a judgment of the District Court for the Northern District of California, Southern Division, entered on July 30, 1941 (R. 166) [2] granting a directed verdict to respondent in an action by petitioner under the Jones Act to recover damages for personal injuries.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 129 F. (2d) 404 (R. 1-10).[3] There was no opinion by the District Court.

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[1] Printed record.
[2] Typewritten record.
[3] Printed record.

II.

Jurisdiction.

1. Petitioner's action was brought under the Jones Act (Act of June 5th, 1920, Ch. 250, Sec. 33; 41 Stat. 1007; 46 U. S. C. A. 688). This Court's jurisdiction rests on Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

2. The petition for certiorari was filed October 2, 1942 and granted November 9, 1942 (R. 11).[4]

III.

Statement.

Petitioner brought an action under the Jones Act (Act of June 5th, 1920, Ch. 250, Sec. 33; 41 Stat. 1007; 46 U. S. C. A. 688) in which he alleged that while employed as a seaman aboard the respondent's vessel S. S. "President Taft", and in the course of his duties while chipping and painting in the boiler room of said vessel on June 3, 1940, a scale of paint flew into his right eye and immediately thereafter he got paint in his eye. That on the following day, the vessel docked at Honolulu, T. H., and petitioner's eye was examined by a competent physician in Honolulu and a diagnosis of acute traumatic conjunctivitis made and immediate hospitalization advised by said physician. That said physician requested petitioner to consult the ship's physician before becoming a patient at the hospital.

That on June 4 petitioner consulted the ship's physician, whom petitioner alleged was then and there respondent's agent, and advised said ship's physician of the examination made by the Honolulu physician and requested instructions of the ship's physician whether petitioner should stay

[4] Printed record.

aboard or remain in Honolulu. That the ship's physician instructed petitioner to remain aboard and adequate medical care would be supplied in San Francisco. That petitioner followed the ship's physician's directions and remained aboard the vessel, and became a patient in the San Francisco Marine Hospital from June 10, 1940 to July 22, 1940.

Petitioner further complained that respondent negligently and carelessly failed and refused to provide petitioner with adequate and sufficient medical care and attention from June 4, 1940 to June 10, 1940 with the result that the infection to petitioner's right eye grew steadily worse until on July 5, 1940 it was necessary to remove the eye. That respondent had the ability to provide petitioner with adequate medical attention when the vessel was at Honolulu.

Petitioner prayed for general damages in the sum of $25,000.00 and for damages resulting from loss of wages at the rate of $80.00 monthly from June 10, 1940 until October 15, 1940. (The complaint is at R. 1-4.) [5]

Respondent answered and admitted that petitioner was employed as a seaman aboard respondent's vessel S. S. "President Taft" during the times stated by petitioner. Admitted that the vessel was docked at Honolulu on June 4, 1940 and that petitioner consulted the ship's physician. Admitted that petitioner remained aboard said vessel when she left Honolulu and became a patient at the Marine Hospital from June 10, 1940 to July 22, 1940. Admitted that the petitioner's right eye was removed on July 5, 1940. Respondent denied petitioner's remaining allegations. (The answer is at R. 5-7.)

Respondent at first admitted that the ship's physician was "then and there the agent and employee of respondent

[5] This and all further references unless otherwise noted are to the typewritten record.

corporation" but subsequently on Motion (R. 8) and Order of Court (R. 9) struck said admission from its answer (R. 10).

The case went to trial before a jury on July 29, 1941, the Hon. Harold Louderback presiding.

At the trial, as will appear from a reference to the abstract of facts hereinafter set forth, petitioner established by substantial evidence that respondent American President Lines, Ltd. negligently failed and refused to provide him with proper medical care, failed to leave him at a properly equipped hospital with eye specialists there in attendance, which were then and there available at Honolulu, T. H., and that by keeping petitioner aboard ship where expert care and facilities were not available, and by taking petitioner back to the mainland petitioner was caused to and he did lose the sight of his right eye.

After all the evidence was in, respondent made a motion for a directed verdict which was granted by the District Court, a judgment on instructed verdict was entered on July 30, 1941 (R. 165).

Thereafter petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and that Court affirmed the judgment on July 3, 1942, Judges Carrecht and Fee concurring on the majority opinion, and Judge Healy writing a separate concurring opinion.

It is the petitioner's contention that the Trial Court erred in taking the case away from the jury, thereby effectively denying petitioner a trial by jury and depriving him of his substantive right to obtain redress by way of damages under the Jones Act for respondent's negligent failure to provide petitioner with proper medical care which resulted in the loss of petitioner's right eye, and that the decision of the Circuit Court was likewise in error.

IV.

Basic Questions Involved.

1. Whether under the facts of the case the Court below erred in taking the case away from the jury on respondent's motion for an instructed verdict, and whether by such action the Trial Court effectively deprived petitioner of his fundamental right to a trial by jury under the Jones Act.

2. Whether under the facts of the case, and in taking the case away from the jury the Trial Court effectively denied petitioner of his right to maintain an action for damages for personal injuries under the Jones Act based upon respondent shipowner's negligent failure to provide proper medical treatment resulting in petitioner's loss of vision in his right eye.

3. Whether a shipowner which employs a licensed physician aboard ship is liable in damages under the Jones Act for the failure of said physician to leave an injured seaman at a port where first class hospital facilities and specialists are available for treatment to the seaman, the vessel then being docked at such a port, or whether the physician's action in keeping the seaman aboard the vessel and returning him to the home port several thousand miles away is merely a mistake in judgment for which the shipowner is not liable.

4. Whether a shipowner which employs a licensed physician is liable in damages under the Jones Act for the negligence of said physician in causing personal injuries to a seaman employed aboard said shipowner's vessel.

V.

The Facts.

Since we seek relief from a Judgment on Instructed Verdict for respondent, we will present and argue from the

facts as they are established in the light most favorable to petitioner.[6]

A. Petitioner's Case.

Petitioner Joseph DeZon testified that in April 1940 he signed on the S. S. "President Taft" as a marine fireman, whose duties are to care for and maintain the fire-room and boilers (R. 13). That on June 3, 1940 while the vessel was at sea he was scraping the side of a boiler and repainting it with aluminum paint. That he chipped paint with one hand and had a paint brush in the other hand, and that while he chipped something went into his right eye; that he started to get up, and hit his head against a pipe; that the paint brush hit his face; and that he had to leave his station to go to his quarters in order to wash his eye (R. 14). That he notified the men in the fire-room before he left his station (R. 14) and that he notified the Second Engineer Mr. Bangs on his return that he had something the matter with his eye (R. 15).

DeZon testified that he followed the instructions of any licensed officer on the vessel; that any licensed officer was his superior (R. 16).

Petitioner stood his 8:30 p. m. watch on June 3, 1940 but "I didn't feel so good so my partner worked for me" (R. 17). When he arose at 7:00 o'clock the morning of June 4, his eye seemed to "pain and hurt" him, so he saw the ship's physician at 7:30 that morning who washed his eye, put some salve in it, bandaged it, and told DeZon not to turn-to, and to notify the engineers that he was relieved from duty, which he did (R. 17). The ship's physician told DeZon on this occasion, "The eye looks pretty bad" (R. 18).

The vessel arrived at Honolulu on June 4, 1940 at about the hour of 4:00 p. m. and at that time the ship's physician

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[6] Empire State Cattle Co. v. Atchison, Topeka, etc. Ry., 210 U. S. 1.

gave DeZon a "hospital slip to go to shore" (R. 19). The U. S. Public Health Service was closed when DeZon arrived ashore, so he went to Queen's Hospital and there was examined by Dr. Yap (R. 20).

Dr. Yap advised DeZon "to get off the ship and go to the hospital then", "to get off the ship as soon as possible", and to notify the ship's doctor that he had to go into the Queen's Hospital (R. 20). DeZon returned to the vessel, arriving there at about 6:00 p. m. *but the ship's doctor was ashore* (R. 20, our emphasis). DeZon didn't feel so well so the orderly put him to bed in the "ship's bay" and told him to wait there until the doctor came aboard (R. 20).

The ship's doctor returned to the vessel at 11:30 p. m. with the vessel scheduled to sail at 12:00 o'clock midnight (R. 21). *DeZon told the ship's doctor that Dr. Yap advised hospitalization at Honolulu, that it was a "pretty bad eye", and that he was "taking a chance if he sailed", and DeZon needed the ship doctor's permission to go ashore* (R. 21). That the ship's doctor replied, *"Well, if you want to take a chance or a gamble on it, you can go to the States. It don't look so bad. It can be all right." DeZon replied, "You are the doctor; you are the boss; if you want to, let's go"* (R. 21, our emphasis).

And, along the same line, this important testimony: (R. 64-65)

Q. (By Mr. Resner, petitioner's attorney) "When you returned and talked to the ship's doctor, did you give him a complete report of everything that transpired at Queen's Hospital?

A. (By DeZon) "Well, as I said, by the time the ship's doctor got to me—I reported back to the ship as soon as I left the Queen's Hospital, pretty close to six o'clock—well, the time he got aboard it was 11:30. By that time I was in bed in the ship's hospital, sick, pretty much under the

weather, and I told him everything that was told to me there."

Q. "Which was what?"

A. "*That if I made the trip I am taking a chance on losing my eye. Well, that is it. Well, he looked at it again. Well, he had his opinion as to whether we should go to San Francisco or not*" (Our emphasis).

Q. "And you followed his advice?"

A. "Well, he is the superior officer. He said, 'Take a chance.' I feel he is an accredited physician." (Our emphasis)

Q. "Therefore, you followed what he suggested and returned to San Francisco, is that correct?"

A. "Yes, yes".

The vessel sailed for San Francisco at midnight June 4, 1940 (R. 22). The eye began to get more and more bloodshot, to tear, to swell, and to pain, the pain extending into the head, and DeZon became faint (R. 59). DeZon remained in the ship's hospital all the way to San Francisco, not doing any work (R. 60). The ship's doctor gave DeZon sedatives to sleep and boric acid washing for the eye, but the pills did no good, and the eye grew progressively worse, and DeZon had a steadily increasing "throbbing pain" (R. 60). The ship's doctor consulted a Navy doctor who was a passenger but DeZon did not get any useful treatment as a result of this (R. 61).

The vessel arrived in San Francisco on the morning of June 10, 1940 and DeZon was removed to the Marine Hospital by ambulance (R. 61). DeZon's right eye was enucleated or removed on July 5, 1940 (R. 62). DeZon remained in the hospital until July 22, 1940, and finally returned to work on October 8, 1940. DeZon testified that he earned no wages from June 10, 1940 to October 8, 1940; that his cash wages, including overtime and bonus were $130 to $140 per month.

Petitioner introduced as his Exhibit No. 3 (R. 59) a report from the Honolulu Hospital, as follows:

"3304 (COPY) C. & C. Emergency. Name, DeZon, Joseph.
Nationality, Caucasian.
Address, S. S. "President Taft".
Sex, Male, Age 36.
In June 4, 1940, 4:34 p. m.
Findings: Acute traumatic conjunctivitis, O. D.
Treatment: Boric wash. Yellow Oxide. Eye pad.
Disposition: Advised hospitalization.
Brought in by self.
Remarks: To consult ship's doctor before going to hospital.

Signed: R. Yap, M. D."

Petitioner called as a witness Percival Elmer Faed, M. D., physician at the United States Marine Hospital in San Francisco, during June-July of 1940. Dr. Faed brought with him the hospital's records on DeZon which were introduced in evidence as petitioner's Exhibit No. 1 (R. 23).

On June 15, 1940 the Marine Hospital diagnosis on DeZon was "*Hemorrhage, anterior chamber, right eye, traumatic*" (R. 25), *which meant that DeZon had blood and inflammation in his right eye and that it was due to injury* (R. 25). On July 5, the eye was removed by Dr. Faed. (R. 27, our emphasis.)

The Marine Hospital records show a report by Dr. Kidd (then at the hospital) of June 11, 1940 which gives the impression that DeZon was suffering from "1. Pan ophthalmitis; 2. Beginning sympathetic ophthalmitis; 3. Irido Cyclitis."

These were explained by Dr. Faed as follows: "The first one is pan ophthalmitis. It is an inflammation involving the whole of the right eye. All the structure of the right eye. The second, 'Beginning sympathetic ophthalmia', is

an inflammation in the eye which is due to injury, sometimes affects the other eye, and there was some suspicion the other eye might have been affected there" (R. 31).

And this testimony: (R. 31-32)

Q. (Mr. Resner) "On these impressions you note here, Doctor, could you give us your opinion as to what caused that impression to be made?"

. . . . . .

A. (Dr. Faed) "The basis was the appearance of the eye. It was painful."

Q. "And the cause?"

A. "And the cause was stated at that time to be due to some injury."

Q. (The Court) "Would that explanation be consistent with what was found in the eye?"

. . . . . .

A. "Oh, yes, it appeared to be that."

Concerning treatment, there was this testimony: (R. 34)

Q. (Mr. Resner) "Now, with respect to treatment, would you read that, Doctor?"

A. (Dr. Faed) "Treatment:" the first part is "Pontocaine, ½%, Second, 'Atropine, 1%, Ointment, applied.' Third, 'Hot B. A.'—or boric acid. Fourth, 'Atropine solution 1%, in right eye three times a day.' Fifth, 'Thyphoid toxin tomorrow afternoon, and omit lunch.' Sixth, 'Send to dental clinic tomorrow a. m. for elimination of foci of infection.' Seventh, 'Emarin Codein compound, tablets 2 for pain as required.' Eighth, 'Pontocaine ½%, two drops in right eye for pain as required.' Ninth, 'Seconal—which is a sleeping powder—'grains 1-1½ at bedtime as required.' Tenth, 'C. B. C.'—which means complete blood count——

• • • The next is dated under 6/11/40, which is the following day: 'Postpone typhoid vaccine until tomorrow morning; omit breakfast.' "

Q. "Now, with regard to the treatment which was given to Mr. DeZon, as indicated by the notes which you have just read, what was the purpose of the treatment? What was it designed to do?"

A. "It was to alleviate his pain and to treat the eye, possibly reduce the hemorrhage in it."

Then, with respect to whether DeZon should have received the kind of treatment he received at the Marine Hospital at an earlier date, Dr. Faed testified, "*I think he should have had some treatment similar to that at an earlier date.*" (R. 50, our emphasis)

and this (R. 50):

Q. (Mr. Resner) "Well, then, do you feel, however, that this treatment that the Marine Hospital in San Francisco gave on June 10th and following should have been given on June 4th and following, is that correct?"

A. (Dr. Faed) "*I should judge so.*" (Our emphasis)

With respect to whether hospitalization would have helped DeZon, there was this testimony: (R. 51-53)

Q. Mr. (Resner) • • • "From your observation of Mr. DeZon in the hospital, and your history of the case, and the diagnosis as made, and your observations, and all the facts and circumstances surrounding this case, can you give me your opinion as to whether Mr. DeZon should have been hospitalized on June 3rd and 4th, when this trouble to the eye first occurred?"

A. (Dr. Faed) "*I believe he should have been hospitalized; it might have helped some.*" (Our emphasis)

• • • • • • • •

Q. • • • "Would it have been your instruction to hospitalize him at the time this trouble to the eye developed on June 4th?"

• • • • • • •

A. *"I think I would have advised it from what I know of the records"* (Our emphasis).

B. Respondent's Case.

Dr. Will Lewis, ship's doctor on the S. S. "President Taft" testified that he went to Cooper Medical College and graduated from the University of Southern California in 1907, interned at Cedars Hospital, Los Angeles, and went into private practice in Santa Barbara County; served in the war, practiced in Ventura until 1929 and "was forced to retire on account of an accident" he had (R. 96).

That he joined the American President Lines in April 1940 and was employed on the "Taft" as ship's surgeon during two trips in 1940. That DeZon came to see him the morning of the date the vessel arrived in Honolulu "with paint in his right eye" (R. 98) and that DeZon "had an irritation due to some foreign body in the eye, which he said was paint. He was given an eye dressing and returned to quarters on that day" (R. 99). The eye was "red and inflamed as always is the condition when there has been a foreign body in it irritating it" (R. 99).

Dr. Lewis testified that he never made a specialty of ophthalmology, and had never done any eye surgery, refractory or eye muscle work (R. 107). Dr. Lewis admitted he had "no special knowledge of the eye" and that he would refer any unusual or serious eye condition to a specialist, particularly if one were available (R. 108).

Dr. Lewis stated he had no record of referring DeZon to the Marine Hospital at Honolulu but that he would not say that he had not done it (R. 110). That DeZon com-

plained of considerable pain when Dr. Lewis first saw him. That Dr. Lewis returned to the vessel about a half hour before the ship sailed and found DeZon in surgery (R. 110) but that he recalled no conversation with DeZon.

Dr. Lewis admitted that a hemorrhage in anyone's eye was a very serious matter which could cause the loss of an eye (R. 112).

The vessel had no eye specialty equipment and no effort was made to procure any at Honolulu (R. 117).

Dr. Lewis stated that it was possible that he gave De Zon a master's certificate to the Marine Hospital at Honolulu because those hospitals do not ordinarily take seamen without one, and that possibly he gave De Zon a certificate but that there was no record of it (R. 119). That if he (Dr. Lewis) did send De Zon to the Marine Hospital at Honolulu it was because the doctor believed De Zon was suffering from a condition other than acute conjunctivitis (R. 129).

Dr. Rodney A. Yoell, called by respondent, testified that he was a licensed physician and surgeon and Chief Surgeon for the American President Lines. That he employed Dr. Will Lewis, checked into where Dr. Lewis was educated, when admitted to practice, and that he was licensed in California for 1940 and 1941 (R. 124-125).

Petitioner stipulated that the respondent found out that Dr. Lewis was a man of good character so far as character and reputation was concerned (R. 129) but petitioner would not stipulate that Dr. Lewis was a competent surgeon (R. 127, R. 128, line 30).

Dr. Yoell testified that the surgeon aboard ship has no power to command, but that he can make recommendations to the master or deck officer who can carry out the order if they see fit (R. 130). That the master can order the surgeon to see a man and treat a man, and that the master can refuse to put a sick man ashore even though the doctor recommend it (R. 122).

Dr. Yoell testified that his investigation of Dr. Lewis revealed that Dr. Lewis was not an eye specialist, but that he was a general practitioner who had some special training in surgery (R. 132). Dr. Yoell did not check to find out whether Dr. Lewis was licensed in 1938 and 1939 (R. 133).

Dr. Yoell further testified that the ship's doctor's authority is limited to diagnosis and treatment and that all final orders are made by the master (R. 134). If a man is very sick, the doctor and master consult on the case (R. 135); that if a man requests the ship's doctor to put him ashore after going to a hospital or doctor on shore, the ship's doctor has to consult with the master, because the master is the only one who can issue the certificate to put the man ashore (R. 136). That the ship's doctor is subject to the master's orders the same as other personnel of the vessel (R. 136).

Dr. Jerome Bettman, called by respondent, testified that he was an eye specialist (R. 138-139). That he never saw De Zone, didn't see the Marine Hospital Records (except for a clinical abstract stating the diagnosis and a bit more data), and that all he knew about the case was from reading Dr. Lewis' deposition and talking to defense counsel (R. 141).

Dr. Bettman admitted that aluminum paint might be more irritating than ordinary paint; that any paint might be irritating (R. 142). That an eye which got paint in it would become red and irritated, become inflamed (R. 143).

Dr. Bettman stated that *the atropin drug used by the Marine Hospital on De Zon should have been applied at the onset of De Zon's disorder; that it is a drug not ordinarily carried by the general practitioner* (R. 149, our emphasis).

Dr. Bettman stated that "it is a little too much to expect of the average general man to be certain that this case is or is not serious, or to be certain of the diagnosis within a

relatively short time" and that *he, as an eye specialist, with a hospital and eye equipment available, would have referred De Zon to the hospital* (R. 150, our emphasis).

The respondent rested.

The respondent made a motion for an instructed verdict, which the Court granted.

VI.

Specification of Assigned Errors to Be Urged.

1. The verdict is contrary to law in that the District Court, by its ruling in taking the case away from the jury, which ruling was affirmed by the Circuit Court, effectively deprived petitioner seaman of his right to trial by jury under the Jones Act, in an action to recover damages for personal injuries.

2. The verdict is contrary to law in that the District Court, by its ruling in taking the case away from the jury, which ruling was affirmed by the Circuit Court, effectively deprived petitioner seaman of his right to maintain an action for damages under the Jones Act based upon the shipowner's failure to render him proper medical care.

3. The verdict is contrary to law in that ruling in this case the shipowner is relieved from liability in an action under the Jones Act for the negligent failure of the vessel's physician to leave an injured seaman at a port where the vessel is docked and where expert hospital facilities and specialists are available, merely by employing such a physician and setting up the claim that such failure to provide treatment is merely a mistake in judgment on the physician's part for which the shipowner is not liable.

4. The verdict is contrary to law in that under the ruling in this case a shipowner is relieved of liability in an action for damages brought by a seaman under the Jones Act

based upon the negligent treatment or failure to treat by the vessel's physician simply by the fact of employing a licensed physician, whereas the law should impose liability on the shipowner for such negligence.

5. The verdict is contrary to law in that the District Court should have allowed the case to go to the jury under the facts pleaded and proved, and the Circuit Court should have reversed the District Court for this reason.

6. The verdict is contrary to the evidence in that taking the case in the light most favorable to the petitioner, as must be done since the verdict was directed against him, there was sufficient evidence upon which the jury could have found for petitioner.

VII.

Outline of Argument.

There is really only one issue in this case: *The District Court should have allowed this case to go to the jury*, and in failing to do so the District Court effectively deprived petitioner seaman of his right to trial by jury, and the decision of the Circuit Court affirmed the deprivation of petitioner's right of jury trial. Wrapped up with this issue is the further issue that by its ruling, the District Court, affirmed by the Circuit Court, effectively denied and impaired the right of petitioner seaman to maintain an action under the Jones Act on account of the vessel's failure to render proper medical care to petitioner and has relieved the shipowner of liability in a case where the doctor's negligence should be attributed to the shipowner. In other words, under the facts of a case like this, the shipowner should not be relieved of liability merely because it has a licensed doctor aboard. Because of the vessel's negligent failure to render proper medical care and to hospitalize petitioner when first class hospital facilities and eye specialists were available for treatment of petitioner's eye

without any trouble whatsoever to the vessel and its officers, petitioner has permanently lost the sight of his right eye.

We intend to show that the District and Circuit Courts erred:

1. In depriving petitioner of his fundamental right to a jury trial.

2. In their interpretation of the Jones Act in cases based upon failure to render proper medical cure.

3. In giving to a remedial statute a narrow and restrictive construction, resulting in a denial of relief which should have been granted.

4. In taking the case away from the jury, where under the facts proved petitioner was entitled to have the jury, not the Court, determine whether proper medical care was or was not given.

5. In deciding that there was not sufficient evidence to take the case to the jury, when in fact there was sufficient evidence upon which the jury could have returned a petitioner's verdict.

VIII.

ARGUMENT.

Point I.

The ruling of the District Court in taking the case away from the jury, and the Circuit Court's decision in affirming that ruling, effectively deprived petitioner of his fundamental right of a trial by jury.

This court, in a seaman's case arising under the Jones Act, has stated:

Jacob v. *The City of New York*, — U. S. —, 75 L. Ed. (Adv.) 750.

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of

federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it * * *".

"*Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury.*

"The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application, suggest that it should not apply to cases arising under legislation, such as the Jones Act designed to enlarge in some measure the rights and remedies of injured employees. But even assuming its applicability, the doctrine does not justify withdrawing this case from the jury. * * *

"Petitioner inspected the wrench, found it defective and then asked three times for a new one. This satisfied the burden of inspection placed on his shoulders by the doctrine, and it was then for the jury to say whether respondent's failure to comply with those repeated requests was negligence on its part. To deny petitioner the right to have the jury pass on that issue because of the simple tool doctrine is to say that doctrine relieves the master of any duty to furnish reason-

> ably safe and suitable simple tools in spite of the fact that he knows they are defective, and requires the servant not only to inspect simple tools for defects, but also to supply his own simple tools when he finds those of the master defective. This is so obvious a perversion of the Jones Act as to require no comment . . . ." (Our emphasis.)

A substitution of the statements concerning failure to render proper medical care in our case for the reference in the *Jacob Case* to the simple tool doctrine will readily demonstrate that our case is one which the trial court should have permitted the jury to pass upon. It was no more within the province of the trial court in our case to decide that respondent satisfied its duty to provide proper medical care for petitioner by having a licensed doctor aboard than it was for the trial court in the *Jacob Case* to say that the simple tool doctrine absolved respondent there of its duty to provide the seaman with safe and proper tools and appliances.

In our case a reference to the evidence wherein he testified that Dr. Yap instructed him to remain in Honolulu for treatment or else he stood a good chance to lose the sight of his right eye, which petitioner communicated to the ship's doctor; the testimony of Dr. Faed that he would have left petitioner in Honolulu at the hospital there, and the testimony of respondent's own witness, Dr. Bettman, to the same effect, the vessel being docked at Honolulu, will demonstrate that this case is one which should have gone to the jury; and though while close the jury could have found a verdict for petitioner. Instead the trial court summarily took the case away from the jury upon the basis of the trial court's opinion that the ship's doctor had done all that he could do, and the Circuit Court approved that action.

With respect to the Circuit Court's opinion, it fails to tell the whole story. For example, the Circuit Court failed to

state, in its summary of the evidence, that petitioner told the ship's doctor that Dr. Yap at Honolulu advised him that if he did not go into a hospital at Honolulu at once for expert treatment, *he stood a good chance to lose the sight of his right eye.* The Circuit Court states that petitioner told the ship's doctor that he preferred to go to San Francisco. This is not the case. Petitioner went to San Francisco on the instructions of the ship's doctor (R. 21). The Circuit Court then goes on to say that Dr. Lewis, the ship's doctor, had no recollection of such conversation, but it must be remembered that this case has to be considered from the standpoint of the evidence most favorable to petitioner.

The Army doctor aboard the vessel on the way to the mainland performed no useful acts nor did he give treatment to petitioner nor did he make a diagnosis (R. 104). Furthermore it is difficult to see how respondent shipowner can relieve itself from liability which should be imposed by its negligent failure to provide proper medical care to petitioner simply on account of the fortuitous circumstance that an Army doctor happened to be aboard the vessel and looked at petitioner seaman. Such an occurrence after the fact of negligence, that is, after failing to leave petitioner at Honolulu, cannot serve to purge respondent of its negligence at the outset of this case. The fact that the Circuit Court offers this circumstance and states further that the Army doctor had "extensive experience in the Orient with eye infections" (R. 2)[7] as a reason for affirming the trial court reveals the inherent error in that opinion which is its failure to recognize petitioner's right to jury trial based upon the failure to leave petitioner at Honolulu and not what happened on the vessel on its journey from Honolulu to the mainland.

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[7] Printed Record.

In other words, had the vessel been on the high seas when petitioner was first injured and had the ship's doctor then treated him and called into consultation a doctor who might have been aboard, a quite different situation would have been presented than that which existed here where the vessel was docked when petitioner requested medical care and where proper care was available ashore than could possibly be given on the vessel. In this connection the Circuit Court fails to give proper consideration to the testimony of petitioner that Dr. Yap advised immediate hospitalization ashore or else petitioner stood a good chance to lose the sight of his right eye, which facts were reported to the ship's doctor at that time, and also the testimony of Drs. Faed and Bettman that they would have given petitioner immediate hospitalization ashore since it was available.

In our case it is undisputed that the ship's doctor was absent from the vessel during the critical period of time when petitioner was most seriously in need of attention. Petitioner had returned to the vessel to inform the ship's doctor that he was advised to go into the shore hospital and get his gear and sign off the ship, but the ship's doctor was nowhere to be found having himself gone ashore. When Dr. Lewis returned, he hurriedly looked at petitioner and advised him to return to the mainland. The absence of the ship's doctor during the critical period of time when petitioner should have been carefully examined and some consideration given to Dr. Yap's instruction that petitioner come ashore certainly adds up to a negligent failure on respondent's part to furnish petitioner with proper medical care within the doctrines of

The Korea Maru, 254 Fed. 397,

and

Cortes v. *Baltimore Insular Line*, 287 U. S. 367.

The Circuit Court's opinion uses our argument that Dr. Lewis did not return to the vessel "until it was almost too late for the ship to put plaintiff ashore" to support its conclusion that the ship's doctor was not negligent. We fail to follow the logic of any such argument. The way we reason from the facts is that the ship's doctor was absent during the critical period when he should have been giving treatment to petitioner but that he still returned to the vessel in sufficient time to put petitioner ashore, and only that, as advised by Dr. Yap. Since time was so short a careful practitioner who wanted to play safe would have put petitioner seaman ashore, but what happened here seems rather obvious to us. Dr. Lewis had returned to the vessel in a hurry, the vessel was about to depart. The doctor probably had some things to do. He made short shrift of petitioner under these circumstances. The facts don't mean that Dr. Lewis gave petitioner's case enough consideration to decide that it was proper to take him to the mainland. The facts mean that Dr. Lewis was in too much of a hurry to give petitioner proper consideration at all.

It should be noted that Judge Healy's separate concurring opinion was based upon the ground that the evidence of want of due care on the part of the ship's doctor was insufficient to warrant submission of the case to the jury. We come to an absolutely contrary view. We think that there was sufficient evidence to send the case to the jury, and we believe that a reference to the abstract of the facts supports our view.

Altogether it is petitioner's contention that the trial court's action effectively deprived him of his fundamental right to trial by jury, and in and of itself this fact is sufficient upon which to order a reversal.

Point II

The verdict is contrary to law in that the District Court, by its ruling in taking the case away from the jury, affirmed by the Circuit Court, effectively deprived petitioner seaman of his right to maintain an action for damages under the Jones Act predicated upon the shipowner's failure to render him proper medical care.

A. *It is settled law that a shipowner's failure to render proper medical care resulting in injury to a seaman is actionable under the Jones Act.*

The rule is stated by Mr. Justice Cardozo in

Cortes v. *Baltimore Insular Line, supra,*

at page 376, as follows:

> "The failure to furnish care is a personal injury actionable at the suit of the seaman during his life . . . ."

And at page 371,

> "If the failure to give maintenance or cure has caused, or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt."

In the cited case, the seaman Santiago died of pneumonia as a result of the alleged negligent failure of the ship to give him proper medical care.

The vessel must furnish proper medical care:

The Korea Maru, supra;

Noirmotv v. *Schooner "Rosemary"*, (U. S. D. C., Va.) 1925 A. M. C. 791;

Broaters v. *States S. S. Co.*, 1930 A. M. C. 919.

In *"The Korea Maru"* (CCA 9) 254 Fed. 398, the shipowner was held liable for the ship doctor's failure to at-

tend one passenger, and for his ignoring another injured passenger, whom he attended only twice, the court finding that the doctor should have attended these injured passengers, and while holding that the question of the skill and competence of the doctor was not actionable as against the vessel, the court did hold:

> "With respect to the charge * * * that the physician * * * neglected the libelants, we are of the opinion that such neglect was an element in the general charge of neglect for which the vessel was liable."

That statment is applicable to the facts of our case, and the trial court should have allowed the question of the ship doctor's ignoring petitioner, being away from the ship at the critical time and paying little attention to petitioner when he came aboard, and failing to put petitioner ashore, go to the jury. Those facts were all included in the general allegation of negligence contained in paragraph VIII of the complaint (R. 3) and were more than sufficient to send the case to the jury.

The Circuit Court's statement that the shipowner's only responsibility is to use reasonable care to select a reasonably competent doctor is not the whole story.

In our case, we have more than that; we have the failure to render treatment, the failure to leave petitioner in Honolulu, which is the gravamen of the action; and under the rule of "*The Korea Maru*", *supra*, such negligence and the failure of the ship's doctor to attend is attributable to the shipowner. The mere fact of a doctor being attached to the vessel cannot excuse the failure to render proper medical care.

And proper care must be furnished within the shortest, most reasonable time possible:

> *Anelich* v. "*Arizona*", (Wash.) 1935 A. M. C. 1332 (Affirmed 298 U. S. 110, 80 L. Ed. 1075),

where a fisherman was injured aboard the vessel at 8:30 a. m. but was not gotten to a doctor until 10:30 p. m., although it was shown that it was only one hour by airplane from the place of injury to the hospital in Seattle where he was to go, and that plane facilities were available. Held, the jury was warranted in finding that adequate treatment and hospitalization were unreasonalby delayed.

To the same effect:

Bennett v. *American West African Line,* (N. Y.) 1933 A. M. C. 419.

So, also, a vessel must put in to the nearest and most convenient port for an injured seaman where proper facilities and treatment are not available aboard, even though the ship thereby is taken off its course:

Persson v. *Gulf Refining Co.,* (N. Y.) 1934 A. M. C. 559,

where a seaman suffered a corneal ulcer, and while it was held that the seaman had no action based upon negligence *causing* his condition, he had a right to compensatory damages resulting from the breach of the ship's duty to furnish medical aid with reasonable promptness and where it appeared that the vessel failed to put him into an available marine hospital en route and that he lost his eyesight as a result thereof, a jury's verdict for plaintiff seaman in the amount of $18,000.00 would not be disturbed.

See also:

Unica v. *United States,* (U. S. D. C., Ala.) 1923 A. M. C. 455,

where a ship's cook suffered a broken arm and internal injuries from a fall aboard the vessel on passage from Hull to Mobile. The first convenient port was Key West, but the master failed to put in. The vessel continued to Mobile and went into drydock. There was an eight days' delay

after Key West and a six days' delay after arrival at Mobile. The seaman's broken arm had to be rebroken on account of the delay, and the man was a year in the hospital. Held, he was entitled to maintenance, cure and compensatory damages in the sum of $1500.00.

A helpful case on the matters in issue here is:

Nicolaisen v. *Swayne & Hoyt* (C. C. A. 5), 70 Fed. (2d) 602,

where a seaman went ashore for medical attention to an injured hand, and brought instructions back to the master from the physician whom he had seen ashore who advised the seaman not to use his hand, which statement the master denied. There was evidence that the seaman had pretty much lost the use of his hand, the seaman claiming that the master had compelled him to work despite the doctor's instructions. Held, for plaintiff seaman, the vessel having failed to furnish the seaman with hospitalization which was available, and with proper care.

Nor need an injured seaman request hospitalization. The master and vessel must furnish it. That is the holding of

Nahmeh v. *United States*, (U. S. D. C., N. Y.), 1926 A. M. C. 1150,

where a seaman was sent ashore at Lisbon for attention to his injured knee, but due to haste and language difficulties failed to see the doctor. The knee became swollen and he went to bed. The chief engineer thought the seaman was a malingerer and so reported to the master with the result that the master paid him no attention on the return home. The seaman's knee became so bad he could not walk off the ship, and subsequently required an amputation. Held: That the seaman need not have requested hospitalization, as it was the duty of the master and of the ship's officers to find out for themselves what was the trouble and act as

reasonable men in doing what was necessary to care for the injured man. For the master's failure to furnish proper care, treatment and supplies after the seaman's accidental injuries in the service of the ship, the ship is liable.

The principles we have outlined were recognized for years in the maritime law prior to the enactment of the Jones Act, and the latter statute has enlarged the duties owed by vessel to seaman.

The Iriquois, 194 U. S. 240.

Cortes v. *Baltimore Insular Line, supra.*

B. *The Jones Act must be liberally construed.*

As is the case with all remedial statutes, the Jones Act must be liberally construed. As stated in:

Torgerson v. *Hutton* (N. Y.) 1935 A. M. C. 195,

> "The Jones Act, a law to promote social justice, should be given a liberal interpretation. All reasonable inferences must be made to support the plaintiff's claim, and all conflicts and doubts resolved in his favor."

Mr. Justice Cardoza noted this principle in:

> "This court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings. * * * This court has said that 'the ancient characterization of seamen as "awards of admiralty" is even more accurate now than it was formerly.' * * * Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.'"

It would follow that the construction and application of the Act to be followed by the Court is that which would give to petitioner seaman's case its full weight and support a recovery where it is possible to allow one.

C. *The District Court failed to apply the cited cases and principles to the case at bar with the result that petitioner was effectively denied relief to which he was entitled, and in which the Jones Act was nullified insofar as an action based upon failure to render proper medical care is concerned.*

In this case, respondent shipowner seeks to avoid liability upon the contention that the only duty the law imposes upon the vessel is to supply a licensed, competent doctor, and that having done that, its duty to the seaman is discharged; that the vessel and its owners are not liable for errors of diagnosis or treatment made or rendered by the doctor (R. 126-127, page 180).

The trial court granted the motion for an instructed verdict, but seemingly upon a different ground, namely, the court determined that the ship's doctor was not negligent so as to bring the responsibility home to the company (R. 156-158).

However, let us consider the facts as they appear in the light most favorable to petitioner. As noted by our narrative of facts, these facts appear:

1. Petitioner was struck in the right eye. This matter was brought immediately to the knowledge of the vessel when DeZon notified Bangs, the Second Engineer. There was negligence here, in Bangs' not immediately sending DeZon to the doctor and notifying the master. Instead Bangs, and through him, the vessel, ignored DeZon. There was here a failure to render medical care within the meaning of

Nahmeh v. *United States, supra.*

2. DeZon reported on his own to the doctor the following morning for treatment and the doctor advised him to refrain from work. That was recognition of the fact that

the injury had serious possibilities. Yet, the doctor paid no particular attention to DeZon at that time, or later—until the injury became obviously very critical.

3. DeZon went ashore, where the shore physician Dr. Yap advised him to get off the ship for immediate hospitalization or he stood a good chance of losing his right eye. This matter was reported to the ship's doctor by DeZon which is notice to the vessel, under the respondent's evidence that the master is in complete charge, even over the doctor, and that the doctor makes up a daily report which goes to the master. Even under this situation, with eye specialists and all necessary medical and hospital facilities available in Honolulu, respondent failed to put DeZon ashore. The ship's doctor ignored the instructions of Dr. Yap. The ship had no special equipment to care for an eye condition, and the ship's doctor was admittedly not an eye specialist. *The failure to leave DeZon in Honolulu under these facts constitutes a clear case of negligent failure to provide proper medical care, however the case may be viewed.*

Certainly if a vessel is held liable for failure to put in,

The Iriquois, supra,
Persson v. *Gulf Refining Co., supra,*
Unica v. *United States, supra.*

and failing to render care within a reasonable time,

Anelich v. *"Arizona", supra,*

it must be held liable where hospital facilities ashore are immediately available without any trouble, effort, cost or inconvenience whatsoever to the vessel, and the vessel fails to put the seaman ashore, but instead takes him on a three thousand mile journey with a serious eye condition.

4. DeZon returned to the vessel at about 6:00 p. m. The ship's doctor did not return until a half hour before sailing

time, some five and one-half hours later. *During this critical period, there was a complete absence of medical care on the part of the vessel.* Under any view of the law, this is negligence.

5. Both Dr. Faed (R. 11) and respondent's witness Dr. Bettman (R. 15), testified that they would have hospitalized DeZon in Honolulu, and that the treatment he received in the San Francisco hospital, which would have been available at Honolulu, would have helped if given to him sooner, particularly the application of atropine, which the ordinary physician does not carry with him (R. 149). Under these facts, the case is very much like

Nahmeh v. *United States, supra,*

and

Nicolaisen v. *Swayne & Hoyt, supra,*

where the injured seamen should have been rendered medical care while their respective vessels were in port.

It was negligence to fail to leave DeZon in Honolulu, and in going to the mainland, DeZon followed the orders of the physician, whom he considered a superior officer—and speaking for the ship's master.

6. Dr. Lewis, the ship's doctor, admittedly was not an eye specialist. All the respondent proved was that Dr. Lewis was licensed to practice in California in 1940 and 1941 (with the latter year we are not concerned). The company failed to find out whether Dr. Lewis was licensed in the years immediately preceding 1940. He testified that he had been disabled and forced to give up private practice. Respondent did not prove Dr. Lewis' competency—and that cannot be presumed from the fact that he was licensed. Petitioner stipulated that Dr. Lewis was a man of good personal reputation, but that has nothing to do with professional competency (R. 125-129).

Dr. Lewis did not remember, nor did he have a record, of whether he had given DeZon a Master's Certificate to go ashore—yet he admitted it was most unusual for the shore hospital to have admitted DeZon without one. There is no question that DeZon was admitted to the Queen's Hospital. He brought back a card from the Hospital, plaintiff's Exhibit No. 3, as follows:

> "5304 (COPY) C. & C. Emergency. Name, DeZon, Joseph. Nationality, Caucasian. Address, S. S. President Taft. Sex, Male. Age, 36. In June 4, 1940, 4:34 P. M. *Findings: Acute traumatic conjunctivitis, O. D. Treatment: Boric Wash. Yellow oxide. Eye pad. Disposition: Advised hospitalization.* Brought in by self. *Remarks: To consult ship's doctor before* going into hospital. Signed: R. Yap, M.D." (R. 39, our emphasis).

Dr. Lewis did not recall any conversation with DeZon—yet DeZon was very specific about the conversation on the doctor's return to the vessel shortly before sailing. Dr. Lewis told DeZon not to work when the latter first reported with a bad eye, yet failed to leave him in Honolulu even though it was reported to him that the shore doctor had given it as his opinion that DeZon would likely lose the eye if he didn't go into the Honolulu hospital at once. Dr. Lewis was away from the vessel until half an hour before sailing time. Under these facts, is it not reasonable to deduce—and could not the jury have found—that Dr. Lewis was not competent, and didn't pay close enough and proper attention to his business, and to DeZon's bad eye. Even under respondent's theory of the case, these were enough facts to send the case to the jury.

7. On the question of Dr. Lewis' negligence, which the trial court found non-existent, we submit that his failure to leave DeZon ashore when that was advised and reported to him by Dr. Yap (through DeZon) despite his

admission that he did not know much about eye disorders, his absence from the vessel at the critical time, his failure to keep records which indicate a disregard of his duties—are all more than enough from which the jury could have found negligence. Such negligence should be attributed to the shipowner who is on notice, since the doctor is supposed to report daily on those ill or injured (R. 130), and the doctor is a subordinate of the master. Under the trial court's view that the doctor must be shown negligent, we think there was more than enough to go to the jury.

The respondent takes the position that it is not responsible for the doctor's negligence or errors in treatment or diagnosis. We think the vessel must be made liable for the doctor's negligence. The members of the crew are at the mercy of the ship's doctor. They have no choice except to follow his instructions. It seems a preposterous situation that a shipowner can employ a doctor who is guilty of negligence in treating a crew member—or, as in our case, failing to treat by not leaving DeZon in Honolulu—and then escape liability by setting up the claim it has employed a licensed and competent doctor. We believe the vessel must be held liable for the ship's doctor's negligence in the same way as the ship is liable under the Jones Act for the negligence of any officer or crew member which injures another crew member.

The cited cases and principles applied to the facts of this case present a clear case for the application of the Jones Act based upon the ship's failure to furnish proper medical care, and for the trial court to have taken the case away from the jury and to have found that there was no possible basis for negligence is an absolute denial and abridgement of the right to maintain an action under the Jones Act with right of jury trial for this wrong in these circumstances. Under any consideration of fact and law, this was not a case for the court to substitute its judgment for that of the jury.

and there was certainly more than enough for the jury to pass upon in considering the doctor's negligence.

Consider further that the Jones Act is to be liberally construed with all presumptions and inferences resolved in petitioner's favor and the conclusion follows that the court erred in its interpretation and application of the statute.

Point III.

The verdict is contrary to law in that the District Court should have allowed the case to go to the jury under the facts pleaded and proved.

A. *Petitioner submits that the Court erred in granting respondent's motion for a directed verdict.*

A directed verdict is proper only where (1) there is a *complete absence of pleading or proof* on an issue or issues material to the cause of action, or (2) there are *no controverted issues of fact upon which reasonable men can differ.*

3 *Moore's Federal Practice*, 3104.

The rule is stated:

> "A directed verdict will be granted only where both facts and inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of one party that the court feels reasonable men could not possibly come to a contrary conclusion."
>
> *North Penn. Ry. Co.* v. *Commercial Bank*, 123 U. S. 727;
>
> *Delaware etc. Ry. Co.* v. *Converse*, 139 U. S. 469.

"*The Norland*" (C. C. A. 9) 101 Fed. (2d) 967, a Jones Act case where the court held that the question of whether a fisherman-seaman was an employee or a joint adventurer was for the jury to decide, and reversed a judgment on directed verdict.

Where the evidence is conflicting or there is insufficient evidence to make only a "one way" verdict reasonably possible, a directed verdict is improper.

Delk v. *St. Louis etc., Ry. Co.*, 220 U. S. 580;
Self v. *N. Y. Life Ins. Co.*, 56 F. (2d) 364.

Nor is it proper to direct a verdict where a contrary verdict, if rendered, would be set aside as against the weight of the evidence.

3 *Moore's Federal Practice*, 3106;
Garrison v. *U. S.*, 62 F. (2d) 41;
Wheeler v. *Federal & Deposit Co.*, 63 F. (2d) 562;
Rodriguez v. *Phillips*, 85 F. (2d) 995.

In ruling on the motion, the Court views the evidence in the light most favorable to the party against whom motion is directed.

Empire State Cattle Co. v. *Atchison, T. etc. Ry.*, 210 U. S. 1;
Gunning v. *Cooley*, 281 U. S. 90;
Corsicana Natl. Bank v. *Johnson*, 251 U. S. 68.

Let us apply the above principles to our case.

B. *There is no absence of pleading.*

The complaint charges a negligent failure on the part of respondent to furnish medical care which, resulting in loss of petitioner's right eye, constitutes personal injuries and is actionable under the Jones Act.

Cortes v. *Baltimore Insular Line, supra.*

C. *Nor is there absence of proof.*

Let us take the evidence in the light most favorable to petitioner with all the inferences to be drawn therefrom.

Reviewing the facts, can it be stated that there was a "Complete absence of proof" or that the evidence was such

that reasonable men could bring in only a respondent's verdict? We think not.

The fact remains that respondent should have put petitioner ashore in Honolulu because that was the advice given by Dr. Yap, and that would have saved the eye. That is the inference and conclusion that must be drawn from the evidence.

We think the failure of the doctor to report a serious eye injury to the master at a time when a report was necessary and it can be reasonably inferred that the failure to report was due to the doctor's absence from the ship, and the respondent thereby failed to render medical aid. Surely these negligent omissions cannot be excused by the declaration that all the vessel has to do is furnish a licensed and competent doctor. That cannot be the law. The finding should be that the vessel failed to render proper medical care.

At least there was sufficient proof in this case to allow the jury to decide whether the vessel gave adequate medical care.

Leone v. *Booth S. S. Co.*, 232 N. Y. 183, 133 N. E. 439.

In the last cited case, the jury returned a verdict for plaintiff which was reversed by the Appellate Division on the ground that all the vessel had to do was furnish a competent doctor. (We think more than that is required.) The seaman's injury had been improperly diagnosed by the ship's doctor as a result of which the seaman suffered great pain. The master failed and refused to put the seaman ashore for hospitalization. Held: It was for the jury to decide whether the master (and vessel) rendered adequate medical care.

We think the *Leone* case is persuasive authority for the proposition that the question of proper medical care was for the jury.

See also,

Stevens v. *O'Brien* (C. C. A. 1), 62 F. (2d) 1933 A. M. C. 871,

where a defendant's verdict was instructed upon the ground that plaintiff cook assumed the risk of coal gas poisoning which he alleged he suffered from a defective stove aboard ship. Held, that the facts stated by plaintiff's counsel must be assumed true for the purpose of instructing a verdict for defendant, and therefore it was error to take the case away from the jury.

We need not take petitioner's counsel's statement in our case. We have more. We have the facts adduced at the trial. Certainly there is more than enough here to send the case to the jury, and it was error for the Court to instruct the jury for respondent, and to deny petitioner's motion to set aside said order and allow a new trial.

Point IV.

The verdict is contrary to the evidence in that taking the case in the most favorable light to petitioner, as must be done since the verdict was directed against him, there was sufficient evidence upon which the jury could have found for him.

We will not review the evidence or the facts most favorable to petitioner. They have been set out.

We submit that these facts are sufficient to support a plaintiff's verdict for the ship's failure to render medical care. Each case must stand upon its own facts, in the final analysis.

The Iriquois, supra.

The facts here are such that reasonable men could well find a failure to render medical care. Certainly under the liberal rules applicable in Jones Act cases, if a plaintiff's

verdict had been found, the appellate courts would hesitate long before setting it aside.

The Iriquois, supra;
Cortes v. *Baltimore Mail Line, supra.*

Consider just these points to support a plaintiff's verdict:

1. The failure of the Second Engineer to send DeZon for treatment on the day of the injury.

2. The absence of the doctor from the ship for the entire evening before she sailed.

3. The failure of the vessel to leave DeZon in Honolulu, although that was advised as necessary by Dr. Yap, and first class hospital facilities were available ashore without a bit of inconvenience to the ship.

4. The indifferent and careless attitude of the ship's doctor to DeZon, in not having a record of issuing the master's certificate, in not bringing what was a serious eye condition to the master's attention at the time when it might have done some good, and in ordering DeZon to return to the mainland.

We feel that it is most reasonable to conclude that the verdict was contrary to the evidence.

Conclusion.

We respectfully submit that the trial court was in error in taking this case away from the jury, and that the Circuit Court's decision was likewise wrong. We submit that a reversal is in order.

Respectfully submitted,

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GEORGE R. ANDERSEN,
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Dated: December 24, 1942.